173 (6) (3)

Nos. 10-196 & 10-252

SUPREME COURT, U.S.
FILED
OCT 22 2010

In The
Supreme Court of the United States

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION; and FISHERMEN AGAINST DESTRUCTION OF THE ENVIRONMENT,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT; CAROL WEHLE, Executive Director; UNITED STATES OF AMERICA and U.S. SUGAR CORPORATION,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT; CAROL WEHLE, Executive Director; UNITED STATES OF AMERICA and U.S. SUGAR CORPORATION,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND CAROL WEHLE, AS ITS EXECUTIVE DIRECTOR

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QUESTION PRESENTED

Congress carefully crafted the Clean Water Act's complex regulatory structure to achieve clean water *while* preserving the primacy of the States' authority over water resources. This case concerns the proper interpretation of the statutory text and cooperative federalism scheme that resulted.

The South Florida Water Management District necessarily operates a vast water control system that regularly transfers and, as a result, discharges navigable waters to implement State water resource policies. Congress was focused upon industrial and municipal wastes when it declared the "discharge of any pollutant" illegal absent a federal permit. Such discharges occur upon the "addition of any pollutant to navigable waters." Other sources of pollution, including other types of "discharges," were left to be addressed other ways.

The Eleventh Circuit's answer to the following question of great national importance is not consistent with decisions of this Court and reveals confusion among the lower courts and the executive department:

> Is it permissible to read the Clean Water Act – consistent with relevant cannons of construction – to criminalize unpermitted "discharges of navigable waters" from State facilities used solely to move the waters for public purposes and that introduce nothing to them?

RULE 29.6 STATEMENT

Respondent South Florida Water Management District is a governmental entity of the State of Florida created by Florida Statutes § 373.069(e).

Respondent Carol Wehle is an individual appearing as the Executive Director of the Respondent South Florida Water Management District.

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STATEMENT

The fundamental issue in this case is whether a state water management agency may lawfully transfer, and as a result, discharge navigable waters to which it adds nothing, without the need for a federal National Pollutant Discharge Elimination System ("NPDES") permit or, conversely, whether the Clean Water Act's ("CWA") NPDES program reaches such traditionally local, vital water management activities. To regulate water management under a federal program designed to eliminate waste discharges would fundamentally alter the federal-state balance stricken by the CWA's cooperative federalism structure.

Congress plainly never intended to criminalize public water transfers or to extend federal NPDES permitting jurisdiction over them. The Eleventh Circuit's finding that it is permissible to read the Act otherwise squarely contradicts relevant decisions of this Court. As a result, the appellate court has given the Environmental Protection Agency discretion where Congress did not. Discretion the agency has already indicated, in its response to petitions for rehearing below, that it intends to exercise. The Agency has since established a task force and is developing a strategy to expand the NPDES. Allowing the Executive Department to be arbiter of its own jurisdiction, without clear direction from Congress, flies in the face of the distinct federal and state roles Congress carefully delineated to preserve the primacy of State authorities. Whatever regulatory certainty

the CWA and the Rule once provided the Nation is gone. Water managers nationwide are stymied by these events.

For these and other important reasons expounded below, these non-federal Respondents respectfully encourage review on certiorari and suggest it is incumbent upon the Court to replace the Eleventh Circuit's errant deference-based rationale[1] with a properly reasoned judicial position that is consistent with directly applicable interpretive doctrines of this Court.

1. Public Water Transfers.

Respondent Carol Wehle is the Executive Director of the Respondent South Florida Water Management District, one of five districts established by the State to provide stewardship over public water resources. The District implements State and Local water policies throughout its extensive jurisdiction, which is larger than the States of Connecticut, Maryland and Rhode Island combined. It is drawn along hydrologic boundaries, to allow a comprehensive watershed approach to managing the Everglades ecosystem. Fla. Stat. §§373.016; 373.069(2)(e). The

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[1] Respondents concede to have, as a fallback argument, supported deference in the past. Deference, however, results from an inferior interpretive analysis that ignores proper linguistic analysis and, more critically, relevant canons of construction discussed herein.

Respondents' complicated mission is to protect water resources of the region by balancing and improving water quality, flood control, natural systems and water supply. These are traditional State functions that entitle the Water Management District to protections of the Eleventh Amendment of the United States Constitution.

The imposition of NPDES strictures is a grave concern to State and Local water managers nationwide[2] and these respondents particularly. The pump stations involved here are but three of 391 water control structures and hundreds of miles of canals and levees that comprise the U.S. Army Corps of Engineer's Central & Southern Florida Project for Flood Control and Other Purposes (C&SF) – the country's largest – for which the SFWMD is the local sponsor.[3] The specter of applying NPDES to the C&SF threatens to impede local control of water management and land use decisions and to divert scarce resources from a joint federal and state multi-billion dollar, multi-agency effort to re-plumb the C&SF project to restore the Florida Everglades and

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[2] Those concerns are extensively documented by hundreds of comments provided during EPA's rulemaking (located at: www.regulations.gov under Docket No. EPA-HQ-OW-2006-0141) and by dozens of amicus curiae that have participated at all stages of this case and in the related matters discussed, *infra*, Statement Part 3 at p. 5.

[3] Fla. Stat. §373.1501(4); *see*, Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H.R. Doc. No. 80-643 (1948).

develop south Florida's water resources. *See* Brief of the United States in *S. Fla. Water Mgmt. Dist. v. Miccosukee*, No. 02-626, 2003 WL 22137034 at *14 (U.S. Sept. 10, 2003) ("mistaken imposition of NPDES permitting requirements . . . is unlikely to provide any substantial environmental benefits. Rather, it would likely misdirect governmental resources and potentially hinder the Everglades restoration process").

Flow diversions accomplished by the District's pumps are categorized as "water transfers" because their operation merely "conveys and connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. §122.3(i) (2008). Public facilities used to move water are an "integral component of U.S. infrastructure." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697, 33699 col. 1 (June 13, 2008) codified at 40 C.F.R. pt. 122 ("Water Transfers Rule"). Thousand of water transfers are routinely conducted by federal, state, and local agencies across the United States for millions of people who depend upon them daily for public water supply, irrigation, power generation, flood control and environmental restoration. *Id.* at 33698 col. 2&3. Since enactment of the Clean Water Act, the EPA has consistently understood that an NPDES pollutant is "added" upon its introduction from outside the navigable waters or, conversely, that NPDES is not triggered when navigable waters containing pollutants

are connected and conveyed, i.e. when waters are merely moved between and among themselves. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).

2. Proceedings Below.

The South Florida Water Management District was dismissed after a finding that its water transfers constitute a traditional State Function which entitled it to Eleventh Amendment protections. Carol Wehle, its Executive Director, was joined as a defendant under *Ex Parte Young*[4] and ordered to apply for NPDES permits.

In the decision for which review on certiorari is sought, the court of appeals reversed the judgment imposing NPDES and held moot Petitioners' cross appeal of the District's dismissal. Under Rule 12 of this Court, both the District and its Executive Director are Respondents entitled to file documents.

3. Related Litigation.

Several pending matters are directly related to this case and will largely be determined by it. The first case, in which this Court declined to decide

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[4] The *Ex Parte Young* doctrine allows State officers and employees to be sued for prospective injunctive relief, despite the 11th Amendment, to prevent ongoing violations of federal law. 209 U.S. 123 (1908).

the question presented here, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, remains pending on remand. 541 U.S. 95 (2004). EPA withdrew a motion to intervene in *Miccosukee* when it became clear this appeal would proceed first. The trial court stayed the case after extensive discovery and pretrial proceedings but shortly before an extensive trial in recognition that this case can and should finally resolve the parties' primary legal dispute.

In 2008, twenty-three petitions were filed to challenge the Water Transfers Rule in the First, Second, Third, Sixth and Eleventh Circuit Courts of Appeals and in the Southern District Courts[5] of New York and Florida. The United States Judicial Panel on Multidistrict Litigation transferred to the Eleventh Circuit those petitions that were filed with the Courts of Appeals. Like *Miccosukee,* these rule challenges have also been stayed in anticipation of a dispositive decision in this case.

In 2002, New York City became the only public water manager, Respondents aside, ever required by a court to obtain an NPDES permit for water transfers. *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"). Over the ensuing years, continuous litigation resulted in multi-million dollar civil

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[5] Challenges were brought in both District and Appeals Courts because of a question, not relevant here, regarding original jurisdiction.

penalties and hundreds of thousands of dollars in attorneys' fees and costs. *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York*, 244 F. Supp.2d 41, 57 (N.D. N.Y. 2003). Further administrative and state court proceedings, vacated the initial permit for authorizing deviations from required effluent limitations and remanded for the City to seek variances (which the permitting agency had never before issued). *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, 71 A.D. 3d 235 (N.Y. 2010). Today, ten years after the City was sued, it remains uncertain whether New York can comply with NPDES. Its attempts to obtain a final permit continue and will inevitably lead to further litigation. The Second Circuit's conjecture that the NPDES program contains sufficient "flexibility," to assure that important State transfers can be authorized, has proven more complicated in practice. *See Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006) ("*Catskill II*"). The burden of misapplying NPDES to water transfers weighs heavily upon public water managers.

REASONS FOR GRANTING REVIEW

While concurring with the Eleventh Circuit's judgment, Respondent Water Managers concede this case amply satisfies the Court's criteria for certiorari review. The Petitions correctly point out that an important federal question regarding the proper interpretation of a major federal regulatory program

is squarely and concisely presented. The question has confounded those courts that have addressed it. Their decisions have yielded inconsistent interpretive approaches and almost uniformly ignored the cooperative federalism principles discussed here. The Executive Department is in similar disarray. Different administrations cannot even agree whether the EPA has been consistent in its views over the years[6] and, now, disagree whether the CWA is ambiguous on the question presented.

After decades in court defending the position EPA codified after years of rulemaking, the Executive Department surprised the Nation, in this case, with the extraordinary declaration that it "in fact intends to reconsider the rule." Federal Response to Motions for Reconsideration En Banc, below, at 15. That singular filing quashed whatever regulatory certainty the Rule purported to provide. A proper interpretation by this Court would end many more years of ongoing and inevitably recurring litigation and rulemaking. Most importantly, it would provide much needed clarity for thousands of state and local water managers who must plan and account for each state's ever changing and complex water and land resource needs during increasingly tough economic times.

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[6] *Cf.* Brief of Former EPA Administrators in *S. Fla. Water Mgmt. Dist. v. Miccosukee*, No. 02-626, 2003 WL 22793539 (U.S. Nov. 14, 2003) and the Water Transfers Rule at 33701 Col. 2.

A critical basis for review not revealed by the Petitions but of utmost concern to these Respondents is that the lower court's rationale conflicts with relevant decisions of this Court. Key canons of statutory construction were misapplied or altogether ignored. Had the lower court followed this Court's guidance and direction, it would have adopted the CWA's only permissible reading, and not deferred. For when properly construed, the plain text, cooperative-federalism structure and principles of lenity – the latter two of which the lower court flatly disregarded – defy attributing to Congress any intent to criminalize unpermitted discharges of the type involved here.

The lower court's deference-based rationale is particularly problematic given that – in the name of cooperative federalism – Congress intentionally delimited federal jurisdiction for the express purpose of preserving States' rights and responsibilities for water and land resource management. 33 U.S.C. §1251(b) & (g). Under today's *Chevron* doctrine, the EPA now views itself free to extend its own jurisdiction well beyond express limits that the Executive Department has often and for decades repeatedly acknowledged were intended by Congress to protect the States. EPA assumed, in its objections to rehearing below, that the Rule, and thus the law, is up for grabs with each change of administration.

By resorting to deference in a cooperative federalism context where deference has no proper place, the lower court further muddied the Clean Water Act and

with it the nationwide regulatory landscape. Congress never delegated to EPA the discretion to redraw the roles the CWA so carefully defined for the federal and state governments. That intrusion, authorized by the Eleventh Circuit, is antithetical to the CWA's core structure.

I. THE ELEVENTH CIRCUIT'S DECISION TO DEFER TO THE EXECUTIVE DEPARTMENT CONFLICTS WITH DECISIONS OF THIS COURT.

Decisions of this Court have set forth relevant interpretive rules that, when faithfully considered, proscribe Petitioners' reading of the CWA and, thus, deference to EPA. Three approaches – misapplied or ignored by the Eleventh Circuit – should have guided its review. First, the linguistic analysis anticipated by *S.D. Warren, Co. v. Me. Bd. of Envtl. Prot.*, yields a singular "ordinary or natural" plain meaning of the relevant limiting language. 547 U.S. 370, 376 (2006). The Eleventh Circuit erred by not giving full effect to a determinative prepositional clause. Second, regardless of whether the Court accepts outright the linguistic approach *Miccosukee* dubbed "unitary waters,"[7] the Eleventh Circuit erred by leaping to deference without yielding to clear statement principles of the Tenth Amendment to the United States Constitution. Principles that were specifically devised

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[7] *Miccosukee*, 541 U.S. at 96.

by this Court for these very circumstances, *i.e.*, to resolve ambiguities in favor of protecting and preserving States' rights and responsibilities. Third, the CWA criminalizes pollutant discharges, implicating this Court's rules of lenity that should equally have constrained the lower court. Before resorting to *Chevron*, courts must exhaust these canons of construction that are intended to guide the determination of whether a statute appropriately lends itself to more than one *permissible* reading.[8] Here the Clean Water Act does not.

In short, nothing in the Act manifests Congressional intent to federally permit State and Local water transfers and to criminalize those that are not. Absent a clear statement of intent to do so, the court erred in finding "reasonable" an interpretation that, when applied, greatly expands federal criminal liability and vests EPA with the apparent authority to re-adjust, at its discretion, the federal-state balance that Congress so carefully struck in creating the CWA.

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[8] Various commentators have debated whether the clear statement and lenity principles discussed herein should be applied: 1) before reaching *Chevron's* domain (Step Zero), 2) under *Chevron*'s Step One, when determining whether the statute is "ambiguous," 3) under Step Two when determining "reasonableness," and 4) or, advocating that *Chevron* has only One Step, when deciding generally whether there is more than one "permissible" reading. Whichever analytical construct, or variation thereof, the Court invokes, the canons discussed here preclude deference in this case.

A. Linguistic Analysis under *S.D. Warren*.

Not long ago, the Court reiterated the need to use great care when construing the CWA:

> It should also go without saying that uncritical use of interpretive rules is especially risky in making sense of a complicated statute like the Clean Water Act, where technical definitions are worked out with great effort in the legislative process. H.R. Rep. No. 92-911, p. 125 (1972) ("[I]t is extremely important to an understanding of [NPDES] to know the definition of the various terms used and a careful reading of the definitions . . . is recommended. Of particular significance [are] the words 'discharge of pollutants'").

S.D. Warren, 547 U.S. at 380. Indeed, when Congress fine-tunes its statutory definitions, it tends to do so with a purpose in mind. *Id.* at 384.

In *S.D. Warren,* the Court noted that the use of prepositional phrasing – "discharge of pollutants" as opposed to "discharge" – was plainly intended to distinguish the jurisdictional reaches of two key Clean Water Act programs. The subject of this case, NPDES – the narrower of those programs – is delimited by the terms "discharge of pollutants" and its definition: "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(7) & (12). The question presented turns upon the proper meaning of these few defining terms. *Friends* Pet. App. at 132a-133a. When carefully construed, the ordinary

and natural meaning of these terms with their definitions excludes water transfers from NPDES. The CWA is neither textually nor contextually ambiguous on the point.

1. Natural and Ordinary Meaning of the Relevant Prepositional Language.

Setting aside the policy arguments discussed below, the relevant linguistic and structural analysis in this case is straight-forward.

a. The triggering statutory term for NPDES "is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water. §1362(12)." *S.D. Warren*, 547 U.S. at 380-81. Since the term "addition" is neither defined in the statute nor a term of art, the courts are left to construe it in accordance with its "ordinary or natural" meaning. *See id.* at 376. The word is commonly understood as "the joining or uniting of one thing to another." Webster's Third New International Dictionary 24 (2002). In turn, the act of "joining or uniting" is commonly understood to require that the "thing" being joined must start apart from, or outside of the "thing" it joins, and be moved to it. It is neither natural nor ordinary, but rather bizarre, to say that two things already together are "joined or united" by the mere movement of one within the other.

There is no dispute in this case over the thing being "added." All navigable waters contain "pollutants" and, therefore, under Petitioners' "distinct waters" approach, become "pollutants" themselves. The relevant dispute here is over the thing "to" which the pollutant must be added or joined, *i.e.*, to what must a pollutant be joined to trigger NPDES? Congress plainly and clearly answered "to navigable waters," which it expressly defined for NPDES purposes to mean: "the waters of the United States." Inserting that definition, NPDES proscribes only those "additions" that join pollutants "to the waters of the United States."

It follows that NPDES does not apply unless a pollutant is moved from outside "the waters of the United States" into them. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). NPDES cannot by the CWA's plain terms be triggered by the mere movement, redistribution or transfer of pollutants within "the waters of the United States." The Sixth Circuit explained that a "facility's movement of pollutants already in the water is not an 'addition' of pollutants to navigable waters of the United States." *Consumers Power*, 862 F.2d at 581, also at 586 (the pollutants "always remain within the waters of the United States, and hence cannot be added").

The United States' amicus brief in *Miccosukee* found this interpretation to be "clear" and further explained that Congress identified and referred to the

navigable waters "*as a whole for NPDES purpose*," an argument *Miccosukee* dubbed a "unitary waters" approach:

> Section 510(12) defines the "discharge of a pollutant" to include "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. 1362(12) (emphasis added). Its use of the modifier "any" with reference to "addition," "pollutant," and "point source" expresses Congress's understanding that the various types of additions, pollutants, and point sources are all within the Clean Water Act's regulatory reach. The *absence* of the modifier "any" in conjunction with "navigable waters," by contrast, signifies Congress's further understanding that "the waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements. Once a pollutant is present in one part of "the waters of the United States," its simple conveyance to a different part is not a "discharge of a pollutant" within the meaning of the Act.

Brief of the United States in *Miccosukee* at *19; *see also Bates v. United States,* 522 U.S. 23, 29-30 (1997) (if "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (quotation marks omitted)).

Further textual confirmation of the "unitary waters" approach comes from the CWA's use of "the" before "waters of the United States." That definitive article has particularizing force when used before a noun and after a preposition. It ordinarily reflects an intention to refer to "the waters" as a whole, not to "a" water, "some" waters, or otherwise individualize the waters it references.

The combined effect of these linguistic choices makes plain that Congress never intended NPDES to reach water transfers of the type here. That makes perfect sense given that, "[t]hroughout its consideration of the [Clean Water] Act, Congress' focus was on traditional industrial and municipal wastes." *Gorsuch,* 693 F.2d at 175.

b. Petitioners' alternative, "distinct waters" reading misses the mark. Again, the United States Brief in *Miccosukee* explained that the "distinct waters" theory does not provide an alternative "reasonable" construction:

> Section 502(12) [the definition of a discharge of pollutants] *cannot reasonably be understood* to include an activity that merely transports navigable waters from one location . . . to another location. Such an activity can conceivably lead to changes in water quality, but it does not, within the normal meaning of the relevant terms, constitute an "addition" of any pollutant to "the waters of the United States."

Brief of the United States in *Miccosukee* at *16 (emphasis supplied).

Critically, the Eleventh Circuit conceded Petitioners' reading alters and embellishes upon the CWA's plain text: Petitioners' "reading effectively asks [the court] to add a fourth 'any' to the statute." *Friends* Pet. App. at 28a. What Petitioners proffer this Court is not a plain reading of the text. They provide instead what amounts to alternative language that Congress could have adopted had water transfers been an intended target. As the "distinct waters" argument makes clear, if Congress wanted to extend NPDES to water transfers, "it could easily have chosen suitable language, *e.g.*, "all pollution released through a point source." *Gorsuch*, 693 F.2d at 176. But, the NPDES system was limited to "addition" to the water from the "outside world." *Id.* at 175. It is well established that statutory terms used with prepositions, as with "addition . . . to navigable waters" here, convey a narrower concept than when used alone. *S.D. Warren*, 547 U.S. at 375. The fundamental mistake of the "distinct waters" theory is to ignore meaningful prepositional language out of a desire to proscribe all "additions" to "any" water.

The Eleventh Circuit, nonetheless, found the statutory language "ambiguous" because it believed the definition "addition . . . to navigable waters" can reasonably be read to refer to waters in the individual sense or to waters as a unitary whole. *Friends* Pet. App. at 26a. That contention was based upon the ordinary usage of the isolated term "waters." Respondents do not disagree that term can collectively refer to several different bodies of water or to any one

body of water. *Id.* But, by isolation of the term "waters" the Court created "ambiguity" that does not exist when the term is read in context of the entire prepositional phrase.

The parties' dispute is not over the undeniable divisibility and distinctiveness of the many "navigable waters." It is over what it means to "add" something "to" them. Quite simply, did Congress call for an addition "to the waters" or "to any distinct waters"? The moniker "unitary waters" merely characterizes an understanding that the former and not the latter was plainly intended. The fact that the "waters" could have been referred to distinctly is implied and irrelevant. The "unitary waters" approach acknowledges that Congress plainly and unambiguously referenced them as an aggregate whole for NPDES purposes. Unfortunately, in support of its proclivity for agency deference, the Department of Justice recently adopted the linguistic fallacy of isolating a single term from its context, which became its basis to retreat from the plain language interpretation the United States advanced in *Miccosukee*. Response of the United States to Petitions for Rehearing En Banc at 12. The United States has now abandoned the position it had defended in this case and every other case on the issue in which EPA participated.

For the same reason, the "unitary waters" approach is not undermined by *Rapanos* and the irrelevant *fact* that the "navigable waters" comprise many distinct water features. *See Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the Court was

confronted with the meaning and scope of the isolated terms "navigable waters," which is not confronted here. The waters involved in this case are all admittedly navigable.

* * *

At bottom, the critical linguistic analysis called for in *S.D. Warren* reveals a singularly plain reading of the relevant definitions. The "distinct waters" approach does not provide a reasonable alternative reading sufficient to render the CWA ambiguous as to the applicability of NPDES to water transfers.

2. Consistency of Purpose and Structure.

Lacking a cogent plain meaning alternative to "unitary waters," advocates of the "distinct waters" theory resort to unpersuasive contextual arguments. Uniformly, they claim that the failure to impose NPDES upon water transfers runs contrary to the CWA's overarching goal of restoring the Nations' waters. 33 U.S.C. §1251(a). That argument fails because 1) the sweeping goals of a comprehensive, multifaceted regulatory scheme speaks little about the intended scope of any particular constituent program; and 2) the argument falsely insinuates that the failure to impose NPDES upon water transfers allows noxious discharges to proceed with impunity outside the CWA as a whole.

The narrow question posed by this case cannot be resolved merely by reference to a general goal. *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643, 647 (2d

Cir. 1993) (citing *Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) ("it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal")). "Caution is always advisable in relying upon a general declaration of purpose to alter the apparent meaning of a specific provision." *Id.* It frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law. *Norfolk So. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007). In fact, Congress' avowed purpose to minimize pollution was not unequivocal, as the CWA's specific provisions are the result of careful balancing of countervailing policies. *See infra*, p. 25, Part I(B)(1)(b). The CWA's grand goal provides no guidance as to how Congress resolved this balancing act. In addition to that general caution, there are more specific indications that Congress did not want to interfere any more than necessary with state water management. *See* 33 U.S.C. §1251(b) & (g). The CWA's overall purpose does not tell us anything about how it is to be achieved or the role of each individual program or provision. To say the least, §1251(a) does not require courts to construe the term "discharge of pollutants" expansively in a way that is contrary to its plain defining language and competing federalism goals.

Fair consideration of the Act as a whole also dispels the concern expressed by the Court in *Miccosukee* that "several NPDES provisions" reflect an intent to protect individual waters that "might be

read to suggest a view contrary to the unitary waters approach." 541 U.S. at 107. The CWA created a multifaceted, comprehensive regulatory scheme that uses a variety of controls to reach its goals, not only NPDES. When limiting federal NPDES jurisdiction, Congress by no means left any non-point [non-NPDES] sources,[9] including water transfers, unaddressed or individual waters unprotected.

To the contrary, the CWA declares: [T]he national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of [the CWA] to be met through the control of both point and nonpoint sources of pollution. 33 U.S.C. §1251(a)(7). More specifically, the CWA stated "the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State." 33 U.S.C. §1251(a)(5).

The Water Transfers Rule makes clear that limiting NPDES does nothing more than leave the control of water transfers to non-NPDES authorities. Water Transfers Rule at 33699 col. 2. In short, while the unitary approach allows water transfers *without NPDES*, it does not remotely propose they can or should be conducted freely, outside the CWA as a whole or with impunity.

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[9] Non-point source pollution is defined by exclusion, it includes all water quality problems not subject to §402, 33 U.S.C. §1342. *Gorsuch*, 693 F.2d at 166.

Indeed, the district court in this case noted the immense, ongoing federal and state effort to address concerns with the entire Everglades ecosystem, including the subject transfers. To that end, the court cataloged the considerable regulatory framework within which the subject pumps operate and that is guiding restoration and protection of the effected water bodies. *Friends* Pet. App. at 103a (District Court Findings Part H). Pumping has been greatly reduced and only occurs today to prevent catastrophic flooding or to protect emergency water supplies during extreme drought. *Id.* at 88a & 108a. Petitioners even conceded below that the pollutants at issue could be addressed in a number of alternative ways.

Petitioners' additional claims, that the "unitary waters" approach undermines other CWA programs equally miss the mark. For example, CWA Section 404, the U.S. Army Corps of Engineers Dredge and Fill Permitting, is a separate and independent program. *United States v. Sinclair Oil, Co.*, 767 F.Supp. 200, 201 n.1 (D. Mont. 1990). As the Water Transfers Rule explains, Sec. 404 is unaffected by excluding water transfers from NPDES. Water Transfers Rule at 33703 col. 3. As well, CWA Section 303, the Total Maximum Daily Load program, does not conflict, but rather supplements NPDES to ensure individual water bodies are protected from other sources of pollution, like water transfers, through a comprehensive watershed planning process. 33 U.S.C. §1313(d) & (e) (requiring States to identify and provide for the protection and restoration of any water body NPDES' effluent limitations do not protect).

Both the Solicitor General, in *Miccosukee*, and EPA in its preamble to its Final Water Transfers Rule, further expounds in detail how the unitary waters approach is supported by, and wholly consistent with, not only the plain language, but also multiple purposes and structure of the CWA. In the end, water transfers have never been generally permitted as desired by Petitioners. The Water Transfers Rule simply codifies the thirty-eight year status quo.

B. Limiting Canons of Construction.

Even were Petitioners' broad "distinct waters" theory to be considered a "reasonable" plain meaning alternative to the "unitary waters" approach, it would be nonetheless impermissible. Two relevant interpretive approaches dictate that result. First, in this cooperative-federalism context, where Congress carefully balanced federal-state interests, "ambiguity" – the absence of a clear manifestation of Congressional intent – requires the court to check Executive powers by adopting the narrower reading. Second, because the CWA is a criminal statute, lenity requires the more limited construction.

1. The "Distinct Waters" Approach Is Not Permissible Under The Tenth Amendment.

To enforce protections of the Tenth Amendment, the Court has enunciated a clear statement rule providing that "[i]f Congress intends to alter the

'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). To that end, Congress must make a clear statement before courts will find that it has interfered with traditional state authorities because "States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. This fundamental interpretive rule dictates that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (a federal statute does not supersede "the historic police powers of the States . . . unless that was the clear and manifest purpose of Congress"). The courts have a "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States." *See United States v. Lopez*, 514 U.S. 549, 580, 581 (1995) (Kennedy, J., concurring).

a. Traditional State Water Management.

The Respondents' responsibility for managing water resources is constitutional. Fla. Const. art. II §7. Its police powers to manage waters for public health, safety and welfare are well established and codified. Fla. Stat. §373.016(3)(j); *see Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).

Comprehensive water management is a State priority. Fla. Stat. §373.016. States' traditional interests in water management are at their peak where the control of pollution in urban and agricultural basins – as in this case – implicates both water and land use planning. 33 U.S.C. §1251(b). Historically, land uses have been widely regulated by state, not federal authorities. The district court found the Respondent South Florida Water Management District entitled to Eleventh Amendment protections precisely because its water transfers constitute the exercise of the State's traditional and primary power over both land and water resources. *Friends* Pet. App. 181a ("The Florida Legislature has recognized that the management and protection of water resources is of critical importance to the *State*." (emphasis in original)). These functions go to the heart of the rights protected as well by the CWA's cooperative federalism and the Tenth Amendment to the United States Constitution.

b. CWA's Cooperative Federalism.

The Clean Water Act follows a cooperative federalism model that envisions a close regulatory partnership between the state and federal governments to restore and maintain the Nation's waters. *Arkansas v. Oklahoma Envtl. Prot. Agency*, 503 U.S. 91, 101 (1992); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). In creating this scheme, Congress struck a careful balance among competing policies and interests. *Id.* at 499. To that end, the CWA established distinct roles for the federal and state governments to

achieve their goals. *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994).

The CWA relies heavily upon the states to maintain primary responsibility to prevent, reduce and eliminate pollution, to plan for the development and use of land and water resources and to consult with the Environmental Protection Agency. 33 U.S.C. §§1251(b) & (g), 1313(d) & (e) & 1329. Congress did not want to interfere any more than necessary with state water management. 33 U.S.C. §1251(g); *Gorsuch*, 693 F.2d at 178. Federal agencies are in turn directed to "co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." 33 U.S.C. §1251(g). Thus, the CWA's cooperative federalism scheme was predicated upon the value of local input and experimentation. The issue is not whether water transfers escape regulation, but by what controls Congress intended them to be addressed.

> In 1972, the Congress made a clear and precise distinction between point sources, which would be subject to direct Federal [NPDES] regulation, and nonpoint sources, control of which was specifically reserved to the State and local governments through [non-NPDES] process * * * judging that these matters were appropriately left to the level of government closest to the sources of the problem.

Pub. L. 95-217, Clean Water Act of 1977, S. Rep. No. 95-370 (July 28, 1977), 1977 WL 16152 at *8-9.

As reflected in the comments of Senator Muskie, the primary sponsor of the legislation in the Senate, programs developed to deal with nonpoint sources "would involve land use and other controls of that kind." Senate Debate on S. 2770 (1972) Leg. Hist. at 1314. Thus, Congress fine-tuned its programs "in order to use them in separate places and to separate ends," leaving many sources of pollution to non-NPDES programs. *S.D. Warren*, 547 U.S. at 383. The NPDES was not designed to address all "pollution" caused by all "discharges," but was limited to the "discharge of pollution." *Id.* In the end, Congress explicitly chose not to federalize all water pollution control. *Gorsuch*, 693 F.2d at 178.

By leaving diversion projects and their navigable-water discharges to non-NPDES controls, including land use planning, Congress preserved the primacy of the States' role in managing water and land resources through programs that address both quantity and quality. This policy reduces "federal/state friction" by allowing States to "continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system." *Gorsuch*, 693 F.2d at 179 (citing H.R. Rep. No. 92-911 at 96 (1972)). That friction is at the heart of the Tenth Amendment. Approaching the water quality problems involved in the management of navigable waters through comprehensive, non-NPDES programs avoids such friction and furthers the CWA's cumulative policies. National Pollutant Discharge Elimination

System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32887 (June 7, 2006).

Courts have noted that legislative history bolsters the view that "[t]he division of pollution control . . . was not just a device for separating out pollution sources amenable to NPDES. . . . Rather, Congress viewed [non-NPDES] state pollution control programs. . . . as in part an 'experiment' in the effectiveness of state regulation." *Gorsuch* at 176. Congress acknowledged that:

> [Non-point-source/non-NPDES programs] may not be adequate. It may be that the States will be reluctant to develop [adequate] control measures . . . and it may be that some time in the future a Federal presence can be justified and afforded. But for the moment, it is both necessary and appropriate to make a distinction as to the kinds of activities that are to be regulated by the Federal Government and the kinds of activities which are to be subject to some measure of local control.

Pub. L. 95-217, Clean Water Act of 1977, S. Rep. No. 95-370 (July 28, 1977), 1977 WL 16152 at *10.

c. Clear Statement Rule And *Chevron*.

Also absent from the CWA is any basis to believe Congress intended in 1972 to delegate to EPA the discretion to determine at what "time in the future a Federal presence can be justified and afforded" and therefore to shift its authority over water transfers.

Discretion to expand jurisdiction over water transfers is not something that Congress manifested any intent to grant EPA. The CWA authorizes EPA's Administrator to "prescribe such regulations as are necessary to carry out his functions under [the CWA]." 33 U.S.C. §1361(a). EPA's authority is not so broad as it is supporting now. It would be anomalous for Congress to have so painstakingly delineated federal state roles – to preserve State authority and minimize federal-state friction – and by implication give the EPA authority to "readjust" those roles. *See Gonzales v. Oregon*, 546 U.S. 243, 259-260 (2006) (implicit authority to adopt an expansive meaning "would transform the carefully described limits on [executive] authority . . . into mere suggestions."). Any inadvertent lack of clarity how and when water transfers are to be federally regulated is not the type of interstitial gap the Executive Department should be authorized by the court's to fill for themselves. The consequences of shifting federal NPDES over State facilities are far too serious to pretend that Congress intended EPA to make the call.

* * *

The need for a clear statement extending federal powers is heightened in this case, where Congress made explicit its policy to preserve the State's primary responsibilities over water and land resources. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 174 (2001) ("*SWANCC*"). In *SWANCC*, the Court applied the

Clear Statement Rule to the CWA, noting that Congress chose to preserve States' rights over land and water resource under §101(b) & (g), rather than "expressing a desire to readjust the federal-state balance" by extending federal jurisdiction. *Id.* Thus, in the cooperative federalism context of the CWA, not only is there a glaring absence of *any*, much less a clear, manifestation of Congressional intent for NPDES to reach water transfers, the CWA contains express limitations designed to avoid friction caused by federal intrusions into the traditional state domain.

Even if the "distinct waters" approach were accepted as a reasonable alternative reading – a concession that inherenty admits the requisite clear statement is lacking – its adoption would plainly shift the federal-state balance. It would also, by implication, grant EPA discretion to extend its own jurisdiction over the States at any time. For these reasons, "distinct waters" is not a "permissible" construction and, therefore, deference was out of place. Cooperative federalism schemes in the nature of the CWA should not be left to administrative fiat, but changed only when Congress deems it necessary.

There can be no denying that the burdens of federal Clean Water Act permitting are not light. *Rapanos*, 547 U.S. at 721 (The burden of federal regulation [under §404] is not trivial); *SWANCC*, 531 U.S. at 161 (2001) ("Permitting the United States government to claim federal jurisdiction" over State water transfers "would result in a significant

impingement of the States' traditional and primary power over land and water use"). For example, the remedies that the Petitioners sought below, include a slew of interim operational restrictions pending the issuance of a permit (*Friends* Pet. App. 47a-48a) and joinder of the State's permitting agency so that the federal court can marshal that State process. *Id.* at 50a. The lower court concedes that these remedies will result in a "somewhat lengthy process . . . further evidentiary hearings, which would require . . . additional discovery. . . . to resolve highly technical arguments." *Id.* at 49a. Indeed, the court conceded that "because EPA does not currently issue permits for water transfers[.] . . . it is unclear what a NPDES permit would ultimately look like (whether it would require treatment of the water, require pumping to cease, contain a pumping schedule, etc. . . .)." *Id.* at 124a. Critically, the court observed NPDES will "provide another layer of review, a Federal review" which it speculated "may do nothing more than provide a more effective mechanism for ensuring [the District's] compliance with its current obligations." *Id.* at 124a, 126a. Such coercion of the State – the shifting of decision making away from the local level to the federal agencies and courts – along with the practical problems of transferring responsibility for pollutant treatment from upstream sources to public water managers, offends core Tenth Amendment values and undercuts the CWA's cooperative federalism scheme.

2. The CWA's Severe Criminal Penalties Require A Narrow Construction Under Principles of Lenity.

Further constraining the court from Petitioners' expansive "distinct waters" approach is the familiar principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). The CWA is enforceable through criminal as well as civil penalties. Violations carry fines up to $100,000 per day and six years' imprisonment. 33 U.S.C. §1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. §1319(c)(1). Under Petitioners interpretation, anyone managing navigable waters so as to change their natural flow and divert water into another "distinct water body" commits a criminal offense. Criminal statutes are subject to a rule of strict construction and the rule of lenity, which require resolving doubts about a statute's meaning against the government. *Crandon v. United States*, 494 U.S. 152, 158 (1990). These rules apply in civil cases to statutory provisions, like Section 402, that have both criminal and civil consequences. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality) (applying the rule of lenity to interpret a "tax statute [with] criminal applications"; the rule is one "of statutory construction[,] * * * not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that

would have been held to apply if challenged in civil litigation"). Because the court found no "unambiguously correct" interpretation of the CWA (*United States v. Granderson*, 511 U.S. 39, 54 (1994)), and because an expansive interpretation exposes Petitioner and countless other public water managers to criminal sanctions, the rules of lenity and strict construction require it be firmly rejected. In this context, any "ambiguity" in the scope of NPDES that survives a principled construction of the Act needed to have been resolved narrowly.

* * *

Properly considered, these established canons of construction reveal a singular "permissible" interpretation of the terms that determine the intended scope of NPDES. Deference and the potential criminalization it brings with it have no place here.

II. THE NARROW LEGAL QUESTION PRESENTED SHOULD BE REVIEWED ON CERTIORARI, NOT LEFT TO FURTHER LITIGATION AND CONTENTIOUS RULEMAKING.

When a court fails to properly interpret a cooperative federalism statute, the burden of the error falls upon the States and the public that must confront it. The Eleventh Circuit's decision exacerbates burdens that are immediate, real and undue, regardless of whether EPA makes good on its promise to reconsider the rule. Thus, Respondents are not seeking an

advisory opinion about speculative future rights or events, but seeking relief from tangible harms presently inflicted by the Eleventh Circuit's errant decision.

A. The Eleventh Circuit and EPA Have Exacerbated Nationwide Disarray and Divisiveness Over The Federal Question Presented.

The Water Transfers Rule formalized the interpretation EPA formed contemporaneously with the passage of the CWA. *Gorsuch*, 693 F.2d at 167.[10] Early on, EPA established and strongly defended its policy not to impose NPDES upon water transfer facilities. *Id.*; *Consumers Power*, 862 F.2d 580. The District of Columbia and Sixth Circuits deferred to EPA's policy expressly acknowledging the CWA's cooperative federalism principles at a time when consistency and

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[10] The Eleventh Circuit and others accepting the "distinct waters" theory as "reasonable" have taken pains to distinguish *Gorsuch* and *Consumers Power* based upon misperceptions that they only involved movements of waters within the same body of water. Those cases, however, do not rely upon any such "assumption of sameness." To the contrary, they both clearly and definitively articulate that NPDES is not triggered by moving polluted water from one "body of water" to another. *Gorsuch* in fact did not even involve a particular facility but rather was a challenge to EPA's nationwide policy not to impose NPDES on tens of thousands of dams of all sorts under the "unitary waters" interpretation, which includes the dams, reservoirs and tunnels ultimately found liable in *Catskill*. The attempted distinction is fallacious.

contemporaneous construction mattered. The Nation's water managers were reassured that the law was clarified and well established.

By 1996, things began to change. The First Circuit invented what became the "distinct waters" test when it rejected the unitary waters approach as being without "basis in law or fact" and "irrational." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996).[11] In 2002, the Second Circuit cast off the "unitary waters" approach, finding EPA's then proposed water transfers rule "simply overlook [the CWA's] plain language." *Catskill II*, 451 F.3d at 84. The trial courts in *Miccosukee* and this matter followed in adopting Petitioners' "distinct waters" approach. *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, No. 98-6056, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999). While the federal government correctly points out that none of these decisions applied *Chevron*, the courts' hostility toward the linguistic and cooperative federalism underpinnings of the "unitary waters" view is palpable and disturbing.

The divisiveness and animus that developed over the course of these cases is equally disquieting. Numerous national amicus on both sides in *Miccosukee* and at all stages of this case attest that the Nation has become sharply and increasingly divided.

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[11] Notably, in *Dubois*, the Forest Service invoked a "unitary waters" argument to avoid permitting of a commercial facility that would not be excluded from NPDES under EPA's position. EPA was not involved.

State Attorneys General have split along regional lines depending in part upon the importance of water transfers to their regions (e.g. transfers are plainly more vital to the arid west than smaller northeastern states). Hundreds of comments to the proposed Water Transfers Rule detail this burgeoning rift. *See* National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule Submissions at www.regulations.gov under Docket No. EPA-HQ-OW-2006-0141.

Matters worsened when past and present EPA officials disagreed whether the agency has been consistent over time. Amicus briefs from former EPA officials were filed with the Court in *Miccosukee* and with the Eleventh Circuit in this case, to refute assertions by the United States that EPA's position has been longstanding and consistent.[12] The Water Transfers Rule expressly refutes those claims. *Cf.* Brief of Former EPA Administrators in *Miccosukee,* No. 02-262, 2003 WL 22793539 (U.S. Nov. 14, 2003) and Water Transfers Rule at 33701 col. 2.

Today, those former EPA officials have rejoined the administration, which has since declared EPA's intent to "reconsider the Rule." The current administration is taking advantage of developments in *Chevron* jurisprudence that make "inconsistency" of an agency's position no longer a basis for declining

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[12] Tellingly, not one example of permitting a public water transfer facility accompanied the claim that EPA has not been consistent.

deference. *Nat'l Cable & Telecomm. Assoc. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005); *Barnhart v. Walton*, 535 U.S. 212, 226 (2002) (particular deference to "longstanding" positions is an "anachronism – a relic of the pre-*Chevron* days"). Apparently, EPA now views itself free to extend its own jurisdiction well beyond express limits that the Executive Department has repeatedly and for decades acknowledged were intended by Congress to protect the States. The problem under that paradigm is that the Rule, and thus the law, is up for grabs with each change of administration.

After decades of litigation and years of rulemaking these parties, water managers nationwide and those who depend upon them are left with greater regulatory uncertainty than ever. The Eleventh Circuit's errant deference-based rationale has further muddled an already confused and contentious regulatory environment.

B. The Resulting Regulatory Uncertainty Is Stymieing Water Managers.

The nation's water managers must plan massive, multi-billion dollar water resource and restoration projects over extended development and implementation periods, often decades out. Since the CWA's enactment thirty-eight years ago, the nation's infrastructure has been planned, developed and modified to address water quality issues under non-NPDES authorities in cooperation with federal agencies. *See* 33 U.S.C. §1251(a)(7), (b) & (g).

These Respondents in particular are in the midst of the world's largest environmental project – restoration of the Everglades ecosystem – which is expected to take decades to finish. Three of those decades into it, the project continues to face significant hurdles. GAO Report to the Committee on Transportation and Infrastructure, House of Representatives, *South Florida Ecosystem: Restoration is Moving Forward but is Facing Delays, Implementation Challenges and Rising Costs* GAO-07-520 (2007). Nearly all projects comprising the federal-state partnered Comprehensive Everglades Restoration Plan ("CERP") are behind the original schedule. National Research Council, *Progress Toward Restoring the Everglades: The Third Biennial Review*, at 1 (2010) (Prepublication Copy) ("National Research Council Review").

These delays result in large part from challenges related to water quality and quantity – the heart of the Petitioners concern with water transfers – that highlight the difficulty of simultaneously achieving restoration goals for all ecosystem components in all portions of the Everglades. *Id.* Achieving water quality goals throughout the South Florida Ecosystem . . . will be enormously costly and will take decades to achieve. *Id.* Petitioners' motivations "belies the inherent complexity of the overarching goal" of the CERP. *Id.* at 126. Extensive multibillion dollar programs and plans are being developed within the framework of the Clean Water Act's non-NPDES authorities, particularly the §303(d) & (e) TMDL and Continued Planning Process, and a judicial consent

decree. *Id.* at 127. Still, there remains some "optimism that if restoration progress continues, substantial ecological benefits will accrue to the ecosystem, even if the effort does not achieve all the restoration goals originally envisioned by the CERP. *Id.* at 2.

The specter of substituting NPDES for CERP's system wide planning effort impedes the planning process for no benefit. *See* Brief of the United States in *Miccosukee v. S. Fla. Water Mgmt. Dist.*, No. 02-626, 2003 WL 22137034 at *14. The Solicitor General explained the "mistaken imposition of NPDES permitting requirements . . . is unlikely to provide any substantial environmental benefits. Rather, it would likely misdirect governmental resources and potentially hinder the Everglades restoration process." Present plans call for developing the most cost-effective mix of "all possible options" for addressing water quality, "including novel treatment approaches, enhanced BMPs,[13] land purchases, and regulatory changes." National Research Council Review at 159. The planning of massive restoration projects fundamentally changes once it is contemplated that the strictures of NPDES might substitute for the better watershed-based planning approach. Billions of dollars are being spent to develop and implement a cost-effective suite of remedies that balances quantity and quality needs throughout the region. NPDES

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[13] BMP means Best Management Practices for land stewardship, that are intended to control land uses that are a source of pollutants entering the navigable waters.

would up-end that effort. Uncertainty of what regulatory scheme the future holds defeats it.

* * *

The Eleventh Circuit's errant decision inevitably perpetuates the decade long cycle of litigation and contentious rulemaking water managers have been enduring. Only this Court, in its critically important role as interpreter of federal laws, can break the cycle. Respondents respectfully suggest the Court should provide the States with the respect called for by the cooperative federalism policies of the CWA, give clarity to the regulatory framework within which they must continue to operate and adhere to important principles of the Tenth Amendment and lenity.

CONCLUSION

Review on certiorari should be granted and the question presented restated as set forth by Respondents South Florida Water Management District and Carol Wehle, as Executive Director.

Respectfully submitted,

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ADDENDUM

Pertinent Provisions of the Clean Water Act

Section 101, 33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) **Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.** The objective of this Act [33 USCS §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 USCS §§ 1251 et seq.] – (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

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(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

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(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act [33 USCS §§ 1251 et seq.] to be met through the control of both point and nonpoint sources of pollution.

(b) **Congressional recognition, preservation, and protection of primary responsibilities and rights of States.** It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources,. . . . It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

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(g) **Authority of States over water.** It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act [33 USCS §§ 1251 et seq.]. It is the further policy of Congress that nothing in this Act [33 USCS §§ 1251 et seq.] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

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Section 303, 33 U.S.C. § 1313. Water quality standards and implementation plans

(d) **Identification of areas with insufficient controls; maximum daily loads; certain effluvient limitations revision.** (1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B), [33 USCS § 1311 (b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

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(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculations. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonable variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

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(e) **Continuing planning process.** (1) Each State shall have a continuing planning process approved

under paragraph (2) of this subsection which is consistent with this Act [33 USCS §§ 1251 et seq.]

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(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307 [33 USCS §§ 1311(b)(1), (2), 1316, 1317], and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section:

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 208 [33 USCS § 1288], and applicable basin plans under section 209 of this Act [33 USCS § 1289];

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

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Section 309, 33 U.S.C. § 1319. Enforcement

(c) Criminal Penalties

(1) Negligent violation.

Any person who –

(A) negligently violates section 1311

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shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

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(2) Knowing violations

Any person who –

(A) knowingly violates section 1311

* * *

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by fine of not more

than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

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Section 319, 33 U.S.C. § 1329. Nonpoint source management programs

(a) **State assessment reports.** (1) Contents. The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which –

(A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this Act [33 USCS §§ 1251 et seq.];

(B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which had significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint

sources identified under 13a subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source; and

(D) identifies and describes State and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the navigable waters, including but not limited to those programs which are receiving Federal assistance under subsection (h) and (i).

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(b) **State management programs.** (1) In general. The Governor of each State, for that State or in combination with adjacent States, shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval a management program which such State proposes to implement in the first four fiscal years beginning after the date of submission of such management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.

(2) Specific contents. Each management program proposed for implementation under this subsection shall include each of the following:

(A) An identification of the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated

under paragraph (1)(B), taking into account the impact of the practice on ground water quality.

(B) An identification of programs (including, as appropriate, nonregulatory or regulatory programs for 14a enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) to achieve implementation of the best management practices by the categories, subcategories, and particular nonpoint sources designated under subparagraph (A).

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Section 402, 33 U.S.C. § 1342. National pollutant discharge elimination system

(a) **Permits for discharge of pollutants.** (1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343],

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***Section 501, 33 U.S.C.* § 1361. Administration**

(a) **Authority of Administrator to prescribe regulations.** The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter [33 USCS §§ 1251 et seq.].

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Section 502, 33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

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(7) The term "navigable waters" means the waters of the United States, including territorial seas.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point sources . . .